Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

HENRY A. MAGYARI,
DRAFTSMAN FIRST CLASS,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether hearsay statements authored by laboratory technicians or personnel otherwise involved in the analysis of blood, breath, or urine are testimonial pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004).

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IN THE SUPREME COURT OF THE UNITED STATES

Henry A. Magyari, Draftsman First Class, United States Navy, Petitioner,

v.

United States of America, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Draftsman First Class Henry A. Magyari, United States Navy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The second opinion of the Court of Appeals for the Armed Forces in this case is published at 63 M.J. 123 (C.A.A.F. 2006). App. A, *infra*, at 1a. The second opinion of the Navy-Marine Corps Court of Criminal Appeals is unpublished. App. B, *infra*, at 12a. The original opinion of the Court of Appeals for the Armed Forces is published at 55 M.J. 358 (C.A.A.F. 2001). App. C, *infra* at 24a. The original opinion of the Navy-Marine Corps Court of Criminal Appeals is unpublished. App. D, *infra*, at 26a.

JURISDICTION

The Court of Appeals for the Armed Forces granted Petitioner's petition for review under 10 U.S.C. § 867(a)(3) and entered judgment in this case on May 10, 2006. This Court has jurisdiction to review this case under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. CONST. amend. VI.

STATEMENT OF THE CASE

This case raises an important, recurring question as to whether reports or affidavits prepared by laboratory technicians or others involved in the collection and analysis of blood, breath, or urine samples are testimonial in nature and implicate the Confrontation Clause of the Sixth Amendment.

The Navy-Marine Corps Court of Criminal Appeals reviewed Petitioner's case pursuant to Article 66(b)(1), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1). The Court of Appeals for the Armed Forces reviewed Petitioner's case pursuant to Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3).

At a special court-martial, Draftsman First Class Henry A. Magyari, USN, (Petitioner) was found guilty contrary to his pleas of wrongful use of methamphetamine in violation of

Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. On April 7, 1998, the officer and enlisted members sentenced him to reduction to pay grade E-3 and a bad-conduct discharge from the United States Navy. On August 11, 1998, the convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

On May 31, 2000, relying on *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), the Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside the findings and sentence, dismissed the charge and specification, and returned the case to the Judge Advocate General of the Navy (JAG) for appropriate disposition. *United States v. Magyari*, NMCCA No. 9801499 (N-M. Ct. Crim. App. May 31, 2000) (unpublished op.). On June 29, 2000, the JAG filed a certificate of review with the Court of Appeals for the Armed Forces (CAAF). On July 2, 2001, CAAF set aside NMCCA's decision and returned the record of trial to the JAG for remand to NMCCA for further consideration of the case in light of *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). *United States v. Magyari*, 55 M.J. 358, 358 (C.A.A.F. 2001) (summary disposition).

On December 15, 2004, NMCCA issued another decision in which it affirmed the findings and sentence as approved by the convening authority. *United States v. Magyari*, NMCCA No. 9801499 (N-M. Ct. Crim. App. Dec. 15, 2004) (unpublished op.). Petitioner petitioned CAAF for a grant of review on February 15, 2005. CAAF granted Petitioner's petition for review on August 30, 2005. On May 10, 2006, CAAF entered its judgment affirming NMCCA's decision. *United States v. Magyari*, 63 M.J. 123, 128 (C.A.A.F. 2006).

The Navy Drug Screening Lab, San Diego, California (NDSL, SD) was established in 1971 in order to "identify, treat, and rehabilitate" servicemembers returning from Vietnam with illicit drug or alcohol addiction and abuse problems. (Command History for the Navy Drug Screening Laboratory, San Diego, CA, *at* http://navydrugscreeninglabsandiego.med.navy.mil/ (Aug., 2003) (accessed on the menu under "About the Command," then "About the Command," then "Command History") (Appendix E) [hereinafter Command History of NDSL, SD].) However, in 1981, following a "War on Drugs" directive and "Zero Tolerance" policy implemented by the Chief of Naval Operations, the NDSL, SD, "implemented forensic drug testing processes with the added requirements of laboratory security, chain-of-custody procedures, method validation, and documentation of training." (Command History of NDSL, SD.) In 1996, the Department of Defense "implemented a Forensic Toxicology Drug Testing Laboratory (FTDTL) Laboratory Information Management System (LIMS) to enhance the forensic integrity of specimen tracking and reporting results." (Command History of NDSL, SD.) "Forensic" is defined as "Pertaining to or employed in legal proceedings or argumentation." (The American Heritage Dictionary 524 (2d college ed. 1982) (Appendix F).)

The government's case-in-chief against Petitioner consisted entirely of Petitioner's positive urinalysis result from February 12, 1998. (Record at 90-139, 198-232; Prosecution Exhibits 2-8.) The government called four witnesses in order to introduce the evidence of Petitioner's urinalysis result: Sonar Technician Chief (STC) Michael S. Szymonik, USN, Chief Operations Specialist (OSC) Steve Hapeman, USN, Fire Control Technician Chief (FTC) David R. Chadwick, USN, and Mr. Robert J. Czarny, a civilian

from NDSL, SD, California. (R. at 90, 106, 125, 198.) STC Szymonik was the command urinalysis coordinator supervising Petitioner's urinalysis, OSC Hapeman was the acting urinalysis coordinator on the date of Petitioner's urinalysis, FTC Chadwick was the urinalysis observer for Petitioner, and Mr. Czarny was the drug lab expert. Mr. Czarny did not analyze Petitioner's sample, but rather was the supervisor of the lab technicians who did.

Upon being called to the stand, Mr. Czarny testified that he attends meetings and workshops of the American Academy of Forensic Sciences and reads journals such as the Journal of Forensic Sciences. (R. at 199.) The prosecutor then asked, "And what exactly -- what would you call the field that you practice in currently?" (R. at 199.) Mr. Czarny responded, "Forensic drug urinalysis." (R. at 199.) The government then tendered Mr. Czarny as an expert in the field of *forensic* drug urinalysis.

The prosecutor introduced Prosecution Exhibits 2, 5, 6, 7, and 8 during the testimony of Mr. Czarny. (R. at 202, 206, 211, 215, 220.) These exhibits recorded the results of the laboratory testing and analysis of Petitioner's urine for the presence of controlled substances. Prior to asking that each of these exhibits be moved into evidence, the prosecutor attempted to lay a foundation that each of the documents was a business record. (R. at 201-202, 205, 210, 214, 220.) These exhibits were admitted into evidence with no objection from trial defense counsel with the exception of Prosecution Exhibit 6, which was admitted after the military judge overruled the defense's foundational objection. (R. at 202, 206, 211, 215, 220.) The government offered no other evidence of methamphetamine use by Petitioner.

Petitioner denied the allegation against him and put on a defense consisting of good military character and possible

innocent ingestion. (R. at 159-161, 183-188, 241-244, 250-253, 255-260, 264-267, 269-271, 273-275.) The jury convicted Petitioner of wrongful use of methamphetamine.

The Court of Appeals for the Armed Forces examined the question of "whether the data entries in [Petitioner]'s urinalysis lab report made by the Navy Drug Screening Laboratory technicians constituted testimonial statements, or whether in the alternative, they represented nontestimonial hearsay . . . ." *Magyari*, 63 M.J. at 126. CAAF answered this question by stating, "in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement investigation, the data entries of the technicians are not 'testimonial' in nature." *Magyari*, 63 M.J. at 125. CAAF's rationale was that, "The lab technicians handling [Petitioner]'s particular sample had no reason to suspect him of wrongdoing, and no reason to anticipate that his sample, out of all the 200 samples in the batch, would test positive and be used at a trial." *Magyari*, 63 M.J. at 126.

REASONS FOR GRANTING THE PETITION

The question of whether laboratory reports and related affidavits are testimonial is one that has arisen repeatedly since this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004).

The lack of a precise definition of what is "testimonial" in *Crawford* has resulted in lower courts deciding each question on a case-by-case basis. Regarding lab reports and related affidavits, this case-by-case approach has resulted in various outcomes with various rationales. The lack of uniformity in answering this question leads to uncertainty and has far-

reaching application, from drug urinalysis testing in the present case, to DNA analysis in rape or murder cases, to blood, urine, and breath analysis in driving under the influence (DUI) or driving while intoxicated (DWI) cases, to the preparation of affidavits by hospital personnel who draw blood to be analyzed.

The lack of a clear definition in this area prevented the lower court in this case from reaching a clear conclusion. First, it held that, because the urinalysis was conducted as the result of a random inspection ordered by a military commander, the statements of the lab technicians implicating Petitioner for using a controlled substance were *not* testimonial. *Magyari*, 63 M.J. at 124-125. However, the lower court goes on to imply that, if the urinalysis were conducted as the result of a probable cause search ordered by the commander, then the statements of the same lab technicians reporting the same results *would be* testimonial. *Magyari*, 63 M.J. at 127.

State courts of last resort have struggled with the definition of testimonial hearsay in this area as well. In *State v. Dedman*, 102 P.3d 628 (N.M. 2004), the Supreme Court of New Mexico held that a blood alcohol report admitted against a defendant in a DWI case was not testimonial despite the fact that the nurse who drew the blood did not testify. The court in *Dedman* acknowledged that the report was prepared for trial, but reasoned that, "the process is routine, non-adversarial, and made to ensure an accurate measurement." *Dedman*, 102 P.3d at 636.

In *Commonwealth v. Verde*, 827 N.E.2d 701 (Mass. 2005), the Supreme Judicial Court of Massachusetts addressed the question of "whether, in light of *Crawford v. Washington*, the confrontation clause of the Sixth Amendment to the United States Constitution requires that

laboratory technicians who analyze drugs seized as part of a criminal investigation authenticate their laboratory findings by appearing at a defendant's trial." *Verde*, 827 N.E.2d at 703 (citation omitted). The court held that, "Because we conclude that a drug certificate is akin to a business record and the confrontation clause is not implicated by this type of evidence, we answer in the negative . . . ." *Id.* The court reasoned that, "Certificates of chemical analysis are neither discretionary nor based on opinion; rather they merely state the results of a well-recognized scientific test determining the composition and quantity of the substance. . . . Accordingly, these drug certificates are well within the public records exception to the confrontation clause." *Verde*, 827 N.E.2d at 705.

However, in *Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004), *modified by* 100 P.3d 658 (Nev. 2004), the Supreme Court of Nevada was faced with the question of whether an affidavit prepared by a nurse pursuant to state law who had withdrawn blood for analysis of its alcohol content was testimonial. Reasoning that, "a health professional's affidavit made pursuant to [state law] is prepared solely for the prosecution's use at trial[,]" the court concluded that, "an affidavit prepared for use at trial is testimonial." *Walsh*, 91 P.3d at 595. Upon further consideration of whether the state law in issue was constitutional under *Crawford*, the Supreme Court of Nevada, sitting en banc, reiterated that, "we conclude the affidavits specified [by state law] are testimonial statements." *Las Vegas v. Walsh*, 124 P.3d 203, 208 (Nev. 2005) (en banc), *cert. denied, Gehner v. Las Vegas*, 126 S. Ct. 1786 (2006).

Florida's Supreme Court will soon be addressing this issue as well. In *Johnson v. Florida*, No. 2D04-3460, 2005 Fla. App. LEXIS 20381 (Fla. Dist. Ct. App. 2005), *certifying*

question to State v. Johnson, 924 So. 2d 810 (Fla. 2006), the Second District Court of Appeal of Florida held that even if it were admissible as a business record, a drug lab report establishing the illegal nature of substances is testimonial if it was prepared pursuant to police investig tion and admitted to establish an element of a crime. *Johnson*, 2005 Fla. App. LEXIS 20381, at *6. The court in *Johnson* then certified the issue to the Florida Supreme Court as a question of great public importance. *Johnson*, 2005 Fla. App. LEXIS 20381, at *11.

Consideration of this issue has not been limited to state courts of last resort. Other courts of appeals have considered this issue and reached varying results for differing reasons. *See People v. Rogers*, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004) (Defendant's Sixth Amendment right to cross-examine witnesses was violated by admission of a blood test report because report was prepared for the purpose of prosecution and documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule); *see also State v. Thackaberry*, 95 P.3d 1142 (Or. Ct. App. 2004) (declining to address the issue of whether a lab report confirming the presence of methamphetamine and amphetamine in defendant's urine was testimonial by finding no plain error).

The lack of a clear statement of the law in this area has led to a nationwide, court-to-court disparity in addressing this issue. Because of the large numbers of prosecutions using lab reports in areas ranging from drug urinalyses to DNA analyses in murder and rape cases to blood, breath, and urine alcohol reports in DUI or DWI cases, this is an extremely important question of law. This Court should settle this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee v.
Henry A. MAGYARI, Draftsman
First Class U.S. Navy, Appellant

No. 05-0300

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

63 M.J. 123; 2006 CAAF LEXIS 607

January 11, 2006, Argued
May 10, 2006, Decided

PRIOR HISTORY: [**1] Crim. App. No. 9801499. Military Judge: Peter J. Straub. *United States v. Magyari, 2000 CCA LEXIS 131 (N-M.C.C.A., May 31, 2000)*

COUNSEL: For Appellant: Captain Richard A. Viczorek, USMC (argued).

For Appellee: Lieutenant Craig A. Poulson, JAGC, USNR (argued); Commander C. N. Purnell, JAGC, USN (on brief).

JUDGES: BAKER, J., delivered the opinion of the Court, in which GIERKE, C.J., and EFFRON and ERDMANN, JJ., joined. CRAWFORD, J., filed a separate opinion concurring in the result.

OPINIONBY: BAKER

OPINION:

[*124] Judge BAKER delivered the opinion of the Court.

Appellant was attached to the Commander, Submarine Force, U.S. Pacific Fleet (COMSUBPAC), in Pearl Harbor, Hawaii. On February 12, 1998, the Navy Drug Screening program randomly generated Appellant's name for urinalysis testing at the Navy Base in Pearl Harbor. At the orders of COMSUBPAC command, Appellant, a petty officer, along with thirty-five to forty other servicemembers, provided a urine sample to the urinalysis coordinators. Appellant's sample and eleven other samples from COMSUBPAC were received by the Navy Drug Screening Laboratory in San Diego, California, six days later. Appellant's sample, identified with lab accession number S9802132117, [**2] was subsequently combined in a batch of 200 samples. Appellant's sample tested positive for methamphetamine. Between receipt of the sample and release of the test results, approximately twenty lab personnel handled and/or tested Appellant's sample.

After a contested special court-martial before members, Appellant was convicted of wrongful use of methamphetamine, a schedule III controlled substance, in violation of Article 112(a), Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 912(a) (2000)*. He was sentenced to a reduction to pay grade E-3 and a bad-conduct discharge. His sentence was approved as adjudged by the convening authority, and except for the bad-conduct discharge, was ordered executed.

The United States Navy-Marine Corps Court of Criminal Appeals affirmed in an unpublished opinion, *United States v.*

Magyari, No. NMCCA 9801499, 2000 CCA LEXIS 131, 2000 WL 703572 (N-M. Ct. Crim. App. May 13, 2000). Upon Appellant's petition, we granted review of the following issue:

> WHETHER, IN LIGHT OF *CRAWFORD v. WASHINGTON, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, APPELLANT WAS DENIED HIS *SIXTH AMENDMENT* RIGHT TO CONFRONT THE WITNESSES AGAINST [**3] HIM WHERE THE GOVERNMENT'S CASE CONSISTED SOLELY OF APPELLANT'S POSITIVE URINALYSIS.

We answer in the negative and affirm the decision of the Navy-Marine Corps Court of Criminal Appeals. As spelled out below, in the context of random urinalysis screening, where the lab technicians do not equate specific samples with particular individuals or outcomes, and the sample is not tested in furtherance of a particular law enforcement [*125] investigation, the data entries of the technicians are not "testimonial" in nature. Nonetheless, the lab results and reports must satisfy the standard for reliability established in *Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).*

BACKGROUND

Appellant testified at his court-martial that he was aware of the Navy's zero tolerance policy on drug use and that he had never knowingly violated it. No wit[illegible] testified to ever seeing Appellant use unlawful drugs in his [illegible]teen years of naval service.

The Government's case against Appellant consisted of a lab report from the Navy Drug Screening Laboratory in San Diego that showed Appellant's urine sample tested positive for methamphetamine. The Government called four witnesses to introduce the evidence [**4] contained in the lab report. The Government called three witnesses stationed at COMSUBPAC in Hawaii, who were involved in the initial collection of Appellant's urine sample. These witnesses included: Sonar Technician Chief Michael S. Szymonik, the urinalysis coordinator, Chief Operations Specialist Steve Hapeman, the designated urinalysis coordinator at the time of Appellant's testing, and Fire Control Technician Chief David R. Chadwick, who observed the Appellant fill his sample bottle in the men's head. One witness was called from the Navy Drug Screening Laboratory in San Diego, Mr. Robert J. Czarny, a civilian quality assurance officer. Mr. Czarny testified about how urine samples are handled and how results are generated at the Laboratory. Mr. Czarny signed off on Appellant's report upon its release, but he was not personally involved in the handling or testing of Appellant's sample. The Government did not call any of the lab technicians at the Navy Drug Screening Laboratory whose names appeared on the lab report and chain of custody documents, and who reviewed Appellant's paperwork, tested his urine sample, or prepared the lab report.

Appellant's defense counsel cross-examined [**5] Mr. Czarny, but did not call any of the other lab personnel who handled or tested Appellant's urine sample. Appellant now argues that his constitutional right to confront the witnesses against him was violated and that any statements contained in the lab report that indicated his urine tested positive for the presence of methamphetamine were inadmissible testimonial hearsay and could not be used against him at trial.

DISCUSSION

When an error is not objected to at trial, plain error analysis applies. *United States v. Gilley, 56 M.J. 113, 122 (C.A.A.F. 2001)*. To prevail under a plain error analysis, Appellant must show that: (1) "there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Tyndale, 56 M.J. 209, 217 (C.A.A.F. 2001)*. If Appellant meets his burden of showing plain error, the burden shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt. *United States v. Brewer, 61 M.J. 425, 430 (C.A.A.F. 2005)*.

The *Confrontation Clause of the Sixth Amendment* states that "In all criminal prosecutions, the accused shall enjoy [**6] the right . . . to be confronted with the witnesses against him . . . ." *U.S. Const. amend. VI*. In Crawford v. Washington, the Supreme Court held that in order for the prosecution to introduce "testimonial" out-of-court statements into evidence against an accused, the *Confrontation Clause* requires that the witness who made the statement be unavailable, and that the accused have had a prior opportunity to cross-examine the witness. *541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*.

Prior to Crawford, the admissibility of out-of-court statements was controlled by Ohio v. Roberts. Under Roberts, the statements of an out-of-court witness could be admitted against an accused if the statements carried adequate indicia of reliability. *Roberts, 448 U.S. at 66*.

The Crawford Court departed from the Roberts framework for admitting out-of-court hearsay statements, and transformed the inquiry to one hinging on whether the out-of-court statement comes within the scope of the *Sixth Amendment* because it "bears testimony" [*126] against an accused. *Crawford, 541 U.S. at 51*. "The lynchpin of the

Crawford decision . . . is its distinction between testimonial [**7] and nontestimonial hearsay . . . .'" *United States v. Scheurer, 62 M.J. 100, 104-05 (C.A.A.F. 2005)* (quoting *United States v. Hendricks, 395 F.3d 173, 179 (3rd Cir. 2005))*. Where nontestimonial statements are at issue, the statements do not fall within Crawford's scope and may be exempted from *Confrontation Clause* scrutiny altogether. *Crawford, 541 U.S. at 68.*

However, the Crawford Court did not "spell out a comprehensive definition of 'testimonial,'" leaving to lower courts the responsibility to determine which statements qualify as "testimonial" and fall within its scope. Id. Nevertheless, the Court identified three forms of "core" testimonial evidence. They include: (1) ex parte in-court testimony; (2) extrajudicial statements in formalized trial materials; and (3) statements made under circumstances that would cause a reasonable witness to believe they could be used at trial. *Id. at 51-52.* Further, the Court identified examples of testimonial hearsay, including "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." *Id. at 68.* [**8]

In addition, the Crawford Court linked its analysis to the legal policies underpinning the right to confrontation. It noted that the focus of the *Confrontation Clause* is to protect criminal defendants from prosecutorial abuse and the "[i]nvolvement of government officials in the production of testimony with an eye towards trial." *Id. at 56.* Thus, the application of Crawford not only depends on the meaning of "testimonial," but on the circumstances and context in which out-of-court statements are generated, and whether the out-of-court statements were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial by the government. *Id. at 52.*

The question before this Court is whether the data entries in Appellant's urinalysis lab report made by the Navy Drug Screening Laboratory technicians constituted testimonial statements, or whether in the alternative, they represented nontestimonial hearsay, subject to the indicia of reliability analysis under Roberts.

The Appellant contends that the data recorded in the lab reports are statements by the lab technicians [**9] and that these statements fall under the third category of core testimonial evidence identified in Crawford because the lab technicians would have anticipated that the lab report would be used against him at trial. The Government argues that the lab reports are business records and therefore are by definition nontestimonial in nature and fall outside Crawford's scope.

On the one hand, technicians working in government laboratories screening and testing urine samples are surely aware that a sample testing positive for a controlled substance may be used to prosecute the provider of the sample. On the other hand, not all urine samples test positive, and not all positive results end in prosecution. The record in this case reflects that the lab technicians work with batches of urine samples containing about 200 samples each. The technicians do not equate a particular sample with a particular person; instead, they assign identification numbers to every sample. The vast majority of samples analyzed do not test positive for illegal substances. The lab technicians handling samples work in a nonadversarial environment, where they conduct routine series of tests requiring virtually [**10] no discretionary judgments. The lab technicians handling Appellant's particular sample had no reason to suspect him of wrongdoing, and no reason to anticipate that his sample, out of all the 200 samples in the batch, would test positive and be used at a trial.

In this context, the better view is that these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. Rather, their data entries were "simply a routine, objective cataloging of an unambiguous factual matter." *United States v. Bahena-Cardenas,* [*127] *411 F.3d 1067, 1075 (9th Cir. 2005)*. See also *State v. Dedman, 2004-NMSC-37, P30, 2004 NMSC 37, 136 N.M. 561, 569, 102 P.3d 628, 636* (finding that a blood alcohol report was prepared in a nonadversarial setting). Because the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would "bear testimony" against Appellant at his court-martial. See *Commonwealth v. Verde, 444 Mass. 279, 827 N.E.2d 701, 704 (Mass. 2005)* (drug tests are nontestimonial if they are "mere[] records of primary fact, with no judgment or discretion [**11] on the part of the analysts"). This conclusion is consistent with the Crawford Court's policy concerns that might arise where government officers are involved "in the production of testimony with an eye toward trial" and where there is "unique potential for prosecutorial abuse" and overreaching. *Crawford, 541 U.S. at 56.*

Approximately twenty different people conducted tests, made clerical data notations in Appellant's records, or at one time had physical custody of Appellant's urine sample while it was at the Navy Drug Screening Laboratory. There is no indication that any of these individuals had reason, or were under pressure, to reach a particular conclusion about Appellant's sample, number S9802132117, or that they had reason to distinguish sample number S9802132117 from the other thousands of samples routinely screened and tested by batch at the laboratory.

To be clear, we reach this conclusion based on the facts of this case. The Government's contention that lab reports are

inherently not testimonial because they are business and public records goes too far. For sure, Appellant's lab report is a business record. Military Rule of Evidence (M.R.E.) 803(6) [**12] implies that lab reports are included in the definition of business records because forensic laboratories are impartial examining centers and a laboratory report is a record of "regularly conducted" activity. At trial, the Government elicited ample testimony verifying that Appellant's report was completed in the normal course of the Navy Drug Screening Laboratory's business. Further, lab results, DNA analyses, and hospital records, are oftentimes prepared in the course of routine, "regularly conducted" business.

Nonetheless, the same types of records may also be prepared at the behest of law enforcement in anticipation of a prosecution, which may make the reports testimonial. See *State v. Norman, 203 Ore. App. 1, 125 P.3d 15, 19 (Or. Ct. App. 2005)* (concluding that the *Sixth Amendment* was not implicated where technicians did not function "as the proxy of the police investigation concerning [the] defendant"). Thus, lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence. For example, cross-examination may be appropriate where a particular [**13] defendant is accused of rape and law enforcement conducts and seeks to admit the results from a blood or DNA test. See *People v. Rogers, 8 A.D.3d 888, 780 N.Y.S.2d 393, 397 (N.Y. App. Div. 2004)*. Cross-examination may also be necessary where a suspect is believed to have operated a vehicle under the influence of drugs or alcohol and a record or affidavit is prepared by hospital personnel for the prosecution's use at trial. See *Las Vegas v. Walsh, 91 P.3d 591, 595 (Nev. 2004)*, modified by *100 P.3d 658 (Nev. 2004)*.

But these factors are not at play in the case addressed today and we need not and do not determine in what other contexts Crawford might apply.

Having determined the data entries in the lab report are not testimonial under *Crawford*, and that there was no plain error, we must still determine whether the lab reports were properly admitted as evidence at trial. In Scheurer, this Court held that when the Crawford framework does not apply, the "Ohio v. Roberts requirement for particularized guarantees of trustworthiness continues to govern confrontation analysis for nontestimonial statements." n1 *62 M.J. at 106* [**14] (internal footnote omitted).

> n1 "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." *Crawford, 541 U.S. at 68.*

[*128] This Court therefore analyzes Appellant's claim under the Roberts framework, which provides that if "the declarant is unavailable to be cross-examined, the *Confrontation Clause* permits the admission of a hearsay statement in a criminal trial only if: (1) the statement 'falls within a firmly rooted hearsay exception,' or (2) it bears other 'particularized guarantees of trustworthiness.'" *Id. at 107* (quoting *Roberts, 448 U.S. at 66*).

The first Roberts condition is satisfied here because the lab report was simply a record of "regularly conducted" activity of the Navy Drug Screening Laboratory that qualifies as a business record under M.R.E. 803(6), a firmly rooted hearsay exception. As the Supreme Court emphasized in

Roberts [**15] , "[p]roperly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.'" *Roberts, 448 U.S. at 66 n.8* (internal quotation marks omitted). See also *United States v. Bridges, 55 M.J. 60, 63 (C.A.A.F. 2001)* (business record exception is firmly rooted). The Roberts analysis is disjunctive, we need not determine whether the lab report at issue in this case carried other particularized guarantees of trustworthiness. Consequently, we conclude there was no error and that the lab report satisfies the requirements of the *Roberts* test for nontestimonial evidence and the statements contained in the lab report were properly admitted as evidence at Appellant's trial.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

CONCURBY: CRAWFORD

CONCUR:

CRAWFORD, Judge (concurring in the result):

I respectfully concur in the result and note that "[t]he plain error issue is not unique to military practice . . . . [and] we should apply Supreme Court precedent in determining whether we correct an error not raised at trial." *United States v. Cary, 62 M.J. 277, 279 (C.A.A.F. 2006)* [**16] (Crawford, J., concurring in the result).

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Henry A. MAGYARI
Draftsman First Class (E-6), U.S. Navy

NMCCA 9801499 Decided 15 December 2004

Sentence adjudged 7 April 1998. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Staff Enlisted Personnel, Commander Submarine Force, U.S. Pacific Fleet, Pearl Harbor, HI.

CDR DENNIS E. BOYLE, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, Appellate Defense Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

Contrary to his pleas, the appellant was convicted of wrongful use of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. §912a. A special court-martial with officer and enlisted members sentenced him to reduction to pay grade E-3 and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

On 31 May 2000, based on *United States v.* Campbell, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration*, 52 M.J. 386 (C.A.A.F. 2000), this court set aside the findings and sentence, concluding that the evidence was legally insufficient to establish that the appellant knowingly used methamphetamine. The Judge Advocate General certified the issue to our superior court, which set aside our decision and remanded the case to this court "for further consideration in light of [*United States v.*] *Green*, [55 M.J. 76 (C.A.A.F. 2001)]."

We have considered each of the eight assignments of error,[1] the Government's response, and the record of trial.

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[1] I. THE EVIDENCE WAS NOT FACTUALLY SUFFICIENT TO CONVICT APPELLANT OF WRONGFUL USE OF METHAMPHETAMINE.

II. WHETHER ARTICLE 112A'S PERMISSIVE INFERENCE OF WRONGFUL USE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

III. WHERE COURT MEMBERS COULD REASONABLY INTERPRET THE WRONGFUL USE INSTRUCTION IN AN UNCONSTITUTIONAL MANNER, THIS COURT MUST HOLD THE INSTRUCTION UNCONSTITUTIONAL.

We conclude that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

This is a positive urinalysis case. The Government offered no other evidence of wrongful use of methamphetamine.

IV. THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE INSTRUCTED THE MEMBERS THAT THEY COULD RELY ON A SEQUENCE OF PERMISSIVE INFERENCES TO FIND THAT APPELLANT HAD WRONGFULLY USED METHAMPHETAMINE.

V. A SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE WAS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF THE OFFENSE AND THE CHARACTER OF THE OFFENDER, A DISTINGUISHED FIRST CLASS PETTY OFFICER WITH OVER 15 YEARS OF LOYAL SERVICE TO THE NAVY.

VI. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHERE TRIAL COUNSEL MISLED AND INTIMIDATED POTENTIAL WITNESSES.

VII. APPELLANT WAS DEPRIVED THE EFFECTIVE ASSISTANCE OF COUNSEL: A. WHEN DEFENSE COUNSEL DELETED PORTIONS OF LETTERS SUBMITTED TO THE MEMBERS DURING SENTENCING AGAINST HIS WISHES, AND THAT THESE DELETIONS PREJUDICED HIS CASE. B. WHEN DEFENSE COUNSEL INTRODUCED EVIDENCE OF APPELLANT'S PRIOR DRUG USE, AGAINST HIS WISHES WHEN SUCH EVIDENCE WOULD CLEARLY BE INADMISSIBLE ON BOTH THE MERITS AND DURING SENTENCING UNDER MIL.R.EVID. 404(b) AND 403.

VIII. TESTING PROCEDURES USED TO COLLECT APPELLANT'S URINE SAMPLE WERE FAULTY, VIOLATIVE OF REGULATIONS AND UNRELIABLE.

On the morning of 12 February 1998, the appellant participated in a random urinalysis at his command. About 30-40 other people contributed urine samples as well.

The appellant lived alone in an apartment off base. In the period of time three to four days before the urinalysis, he testified that he followed his normal daily routine and did not socialize with others after work, with the exception of the night before the urinalysis.

The night before the urinalysis, according to the testimony of the appellant and a friend, Barbara Robinson, the two of them went out together. They ate dinner at the Hard Rock Café, then entered a club called The Wave. After drinks were delivered to their seats, they left the drinks on the banister and went to the restrooms. When the appellant returned, he found two strangers sitting in their seats. The appellant explained that those seats were taken, and the men moved elsewhere. He noticed that the drinks had been moved a bit. Otherwise, there was nothing to indicate that the drinks had been tampered with. The appellant drank some from his drink.

The appellant and Ms. Robinson later returned to their homes. He did not feel strange or unusual that evening, nor did he have any difficulty sleeping that night.

Sufficiency of Evidence

In his assignment of error, the appellant asserts that the evidence is factually insufficient. In his supporting analysis, the appellant also questions the legal sufficiency of the evidence. Accordingly, we will examine both the legal and factual sufficiency of the evidence, as we are required to do in any contested case. Art 66(c), UCMJ.

This court's standard of review for sufficiency of the evidence is set forth in Article 66(c), UCMJ:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

Further, this standard and its application have been recognized and defined by the Court of Appeals for the Armed Forces:

> under Article 66(c) of the Uniform Code, 10 U.S.C. § 866(c), the Court of [Criminal Appeals] has the duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 [ ] (1979). For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not

> having personally observed the witnesses, the members of the Court of [Criminal Appeals] are themselves convinced of the accused's guilt beyond a reasonable doubt.

United States v. Turner, 25 M.J. 324, 324-25 (C.M.A. 1987).

In support of this assignment of error, the appellant relies on three arguments. First, the low level of the methamphetamine metabolite in his urine sample suggested the possibility of innocent, or unknowing, ingestion, which the Government's expert witness actually vouched for. Second, discrepancies in the urinalysis collection procedures call into question the reliability of the Government's evidence. Third, the absence of evidence of signs of drug use, combined with evidence of excellent military character and character for truthfulness negate any inference of wrongful use. After careful consideration, we are not persuaded by these arguments.

Taking up the appellant's first argument, we note that the appellant's urine sample tested positive for the methamphetamine metabolite at a level of 2200 nanograms/milliliter (ng/ml). The analysis also revealed that the amphetamine metabolite was present at a level of 467 ng/ml. Under Department of Defense standards, the cutoff for a positive result for these two drugs is 500 ng/ml.

Mr. Robert Czarny was the Government's expert witness from the Naval Drug Screening Laboratory. He testified that a person who ingests sufficient methamphetamine to test positive will normally have both methamphetamine and amphetamine metabolites in his urine. Methamphetamine is not naturally produced in the body. Based on all the test results, Mr. Czarny opined that the

person who produced the urine sample probably ingested methamphetamine within three to four days before the urinalysis. More specifically, he testified that, based on the ratio of methamphetamine to amphetamine in the urine sample, the methamphetamine was probably consumed between 48-60 hours before the urinalysis.

Under cross-examination, Mr. Czarny conceded that he could not disprove the possibility of ingestion within 12 hours before the urinalysis, observing that 2200 ng/ml would be consistent with an inadvertent dose under that scenario. Mr. Czarny later affirmed that the test results are consistent with a larger amount of drug consumed about 48-60 hours before the urinalysis.

Based on our review of the entire record, we credit Mr. Czarny's disinterested expert testimony and conclude that the appellant's speculative argument that two strange men might have placed methamphetamine in his drink is incredible. That argument does not place a reasonable doubt in our minds.

The appellant then moves on to attack the reliability of the urinalysis collection process. He emphasizes various discrepancies, including: (1) the urinalysis coordinator was not appointed in writing by letter from the commanding officer; (2) there were differences in social security numbers between the bottle for another Sailor and the chain of custody form; (3) five other samples were logged in within four minutes of the appellant's sample being logged in; (4) the urinalysis coordinator also served as the command Drug and Alcohol Program Advisor (DAPA).

As we consider these discrepancies, we observe that the appellant testified that his urine was in the bottle labeled

with his social security number, matched by an appropriate entry in the command ledger. He also testified that the bottle was put in the box at the coordinator's table. The box arrived at the laboratory in good condition with the outer seal "intact and signed." Prosecution Exhibit 2. Prosecution Exhibit 2 also lists the correct social security number of the appellant beside his sample number. Given this evidence, we see no reason to doubt the integrity of the chain of custody of the appellant's urine sample. Assuming, without deciding, that the various discrepancies occurred as alleged, we conclude that they did not affect the reliability of this urinalysis. *See United States v. Pollard*, 27 M.J. 376, 377 (C.M.A. 1989).

We have considered the remaining argument of the appellant, as well as all other matters in the pleadings that pertain to this assignment of error. We conclude that a reasonable factfinder could properly have found, beyond a reasonable doubt, that the appellant wrongfully used methamphetamine, as charged. Moreover, after careful consideration, we are convinced beyond a reasonable doubt that the appellant is guilty of that offense.

Trial Counsel Misconduct

The appellant argues that the trial counsel misled and intimidated a potential defense witness. We conclude that no prejudicial error was committed.

According to the appellant, during the course of trial preparation, he had given the name of Yeoman Second Class (YN2) Alan Inglis, U.S. Navy, to the trial defense counsel (TDC) as a possible character witness. The trial counsel apparently learned that YN2 Inglis was a potential witness and decided to interview him. According to YN2 Inglis, the trial counsel told him that the appellant had confessed to

using drugs at The Wave and asked if the appellant had said anything about that to YN2 Inglis. YN2 Inglis answered "no" and the interview soon ended. YN2 Inglis then called the appellant and relayed what had happened. When the appellant disclosed this information to the TDC, she said that the trial counsel never would have said that. Neither side called YN2 Inglis to testify in the case. The appellant's defense counsel did call three commanders and two chief petty officers as character witnesses on the merits.

We note that the Government has not offered an affidavit from the trial counsel in response to this allegation. Assuming, without deciding, that the trial counsel lied to YN2 Inglis during the interview, we nevertheless conclude that the appellant suffered no prejudice. His defense counsel presented a strong case in good military character through the testimony of five "khaki" witnesses and buttressed that testimony with the appellant's outstanding enlisted evaluations from his career. YN2 Inglis's testimony, if offered, would have been cumulative of the more senior enlisted and officer witnesses. This assignment of error lacks merit.

Effective Assistance of Counsel

The appellant next asserts that he was deprived of the effective assistance of counsel at trial. He argues that the TDC improperly redacted two "good character" letters admitted in mitigation of his offense. He also contends that the TDC elicited inadmissible testimony from the appellant during his testimony on the merits.

A claim of ineffective assistance of counsel is analyzed under the two-part test set forth by the U.S. Supreme Court: (1) Was the counsel's performance

deficient; and (2) If so, was the deficient performance prejudicial? *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An appellant bears a heavy burden to show ineffective assistance because counsel are presumed to act in a competent and professional manner. To overcome that presumption, the appellant must show that the lawyer's performance was "unreasonable under prevailing norms." *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001).

We have examined the character letters in question in light of the appellant's complaint. We do not believe that the TDC erred in redacting a paragraph from each of the letters, and we are completely confident that the appellant suffered no prejudice because of the omissions. Given our collective experience in the courtroom, we conclude that even if the omitted material had been presented to the court, it is highly unlikely that the sentence would have been less severe.

The second complaint focuses on a tactic taken by the TDC in the first few moments of the appellant's testimony on the merits. The TDC elicited from the appellant that he had experimented with marijuana a few times before he joined the Navy, declared that to the recruiting officer, but did not need a drug waiver in order to enlist. She also had the appellant state his awareness and support of the Navy's zero tolerance policy. The appellant essentially complains that, even if the TDC was trying to remove the sting from any cross-examination along these lines, that tactic was unnecessary because such evidence was inadmissible under any circumstances.

We cannot agree that such evidence was inadmissible under any circumstances. Depending on the appellant's testimony, such evidence may have been admissible as

impeachment of the appellant's credibility, if nothing else. It was entirely within the range of appropriate strategy or tactics for the TDC to preempt the trial counsel's cross-examination and take the "sting" out of such testimony.

In evaluating claims of ineffective assistance, we do not second-guess strategic or tactical decisions of counsel. *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000). Even if the TDC's questions are construed as deficient performance, we conclude that the appellant was not prejudiced. His pre-service drug experimentation occurred in his youth 15 years in the past. We are confident that the members did not hold that against him in deciding whether he wrongfully used methamphetamine. This assignment of error is without merit.

Sentence Appropriateness

The appellant contends that a sentence including a bad-conduct discharge is inappropriately severe. Specifically, he argues that his flawless record of 15 years of service and his excellent performance of duty should outweigh the single offense of which he stands convicted.

In determining the appropriateness of a sentence we are to afford the appellant individualized consideration under the law. We must review the appropriateness of the sentence based upon the "nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After balancing the offense against the character of the appellant, we conclude that the sentence is entirely appropriate for this first class petty officer who abused methamphetamine.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX C

U.S. v. Henry A. MAGYARI.

No. 01-5006/NA.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

55 M.J. 358; 2001 CAAF LEXIS 807

July 2, 2001, Decided

SUBSEQUENT HISTORY: Motion granted by *United States v. Magyari, 61 M.J. 62, 2005 CAAF LEXIS 325* (C.A.A.F., 2005)

PRIOR HISTORY: [*1] CCA 98-1499. *United States v. Magyari, 2000 CCA LEXIS 131* (N-M.C.C.A., May 31, 2000)

JUDGES: GIERKE, Judge dissenting.

OPINION:

On consideration of the certified issue,* in light of United States v. Green, No. 00-0268, __ MJ __ (2001), we answer the certified issue in the affirmative. Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy

for remand to that court for further consideration in light of Green.

*WHETHER THE LOWER COURT ERRED IN FINDING THE EVIDENCE LEGALLY INSUFFICIENT TO PERMIT THE FACTFINDER TO INFER THE ACCUSED'S KNOWING AND WRONGFUL USE OF METHAMPHETAMINE WHERE UNITED STATES V. CAMPBELL STATED IT DID NOT CREATE NEW LAW AND WHERE THE EVIDENCE PRESENTED AT TRIAL WAS AT LEAST THE SAME QUANTUM OF EVIDENCE THIS COURT PREVIOUSLY FOUND LEGALLY SUFFICIENT IN NUMEROUS PRE-CAMPBELL CASES.

DISSENTBY: GIERKE

DISSENT:
GIERKE, Judge (dissenting): I dissent from the order of the Court.

APPENDIX D

UNITED STATES v. Henry A. MAGYARI, Draftsman First Class (E-6), U.S. Navy

NMCM 98 01499

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2000 CCA LEXIS 131

May 31, 2000, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 7 April 1998. Military Judge: P.J. Straub. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Staff Enlisted Personnel, Commander Submarine Force, U.S. Pacific Fleet, Pearl Harbor, HI.

DISPOSITION: Findings and sentence are set aside. The Charge and Specification dismissed.

COUNSEL: LT OMAR R. LOPEZ, JAGC, USNR, Appellate Defense Counsel.

Maj MICHAEL D. TENCATE, USMC, Appellate Government Counsel.

JUDGES: BEFORE CHARLES Wm. DORMAN, Senior Judge, R.H. TROIDL, Senior Judge, K.J. NAUGLE, Judge. Senior Judge TROIDL and Judge NAUGLE concur.

OPINIONBY: CHARLES Wm. DORMAN

OPINION: DORMAN, Senior Judge:

At his special court-martial the appellant was convicted, contrary to his pleas, of the wrongful use of methamphetamine. The appellant's offense violated Article 112a, Uniform Code of Military Justice, *10 U.S.C. § 912a.* The officers and enlisted members of his court sentenced the appellant to reduction to pay grade E-3 and a bad-conduct discharge. The convening authority approved the sentence.

We have carefully reviewed the record of trial, [*2] the appellant's six assignments of error, and the Government's response. Additionally, we considered the appellant's "Reply To Answer Of Government," his "Supplemental Arguments," and the Government's "Answer to Supplemental Argument(s)." We also considered the excellent oral arguments of appellate counsel presented on 25 May 2000. Following our review pursuant to Articles 59(a) and 66(c), UCMJ, we find error.

Legal Sufficiency

In his first assignment of error, the appellant challenges the legal sufficiency of his conviction. In support of his position, the appellant relies upon *United States v. Campbell, 50 M.J. 154 (1999), supplemented on reconsideration, 52 M.J. 386 (2000).* Based upon our understanding of the

Campbell decision, we are compelled to agree with the appellant that the evidence is legally insufficient in this case.

Facts. The appellant was attached to Commander, Submarine Force, U.S. Pacific Fleet, located in Pearl Harbor, Hawaii. On 12 February 1998 he responded to a call for a random command urinalysis screening and provided a urine sample. At trial the appellant acknowledged that his urine sample was properly [*3] labeled. The Government established that the appellant's urine tested positive for the presence of methamphetamine. This was established through the testimony of the program coordinator on the day the appellant's urine sample was collected, the individual who observed the appellant provide the sample, and Dr. Robert Czarny, a chemist from the Navy Drug Screening Laboratory [NDSL] where the urine was tested. In fact, the appellant's urine tested positive on four separate tests conducted by the NDSL. The first two tests were screening tests using a radio-immunoassay procedure. After both of those tests resulted in positive readings, two confirmatory tests were performed using the gas chromatography/mass spectrometry [GC/MS] test. The first confirmatory test revealed a reading of 2235 nanograms of methamphetamine per milliliter. This was well above the cut-off level of 500 nanograms. The second GC/MS test was conducted to determine the "handedness" of the methamphetamine molecules found in the appellant's urine, to rule out the possibility that the methamphetamine had come from some substance other than a controlled substance. Again this test revealed the presence of methamphetamine [*4] in the appellant's urine. The chemist further testified that methamphetamine does not naturally occur in the human body.

During cross-examination the chemist acknowledged that a reading of 2200 nanograms would be consistent with inadvertent use if the methamphetamine had been consumed

within 12 hours of providing the urine sample. He also acknowledged that methamphetamine is odorless and tasteless, and that it is water-soluble. If the methamphetamine had been consumed within 12 hours of providing the urine sample, the dosage would have been subtherapeutic, and it would not have produced an effect. On redirect, the chemist testified that the nanogram level is also consistent with a higher dosage taken more than 12 hours prior to providing the urine sample. In his opinion, if the methamphetamine had been consumed 60 hours before the sample was provided, the drug would have produced an effect on the person taking the drug.

The appellant testified that he did not knowingly use methamphetamine. Through his testimony, he suggested the possibility that he could have inadvertently consumed the drug the evening before he provided his urine sample. He testified that the prior evening he had [*5] gone to the Hard Rock Cafe and to a bar called The Wave, both located in Waikiki, HI. He testified concerning a minor run-in he had with two individuals who had taken his seat, and that of the woman he was with, when they both left their seats to use the restroom. His female companion also testified, confirming the evening's events as recalled by the appellant. She specifically testified that she did not see the appellant use any drugs on the evening of 11 February 1998.

The appellant also called an agent for the Naval Criminal Investigative Service to testify. He testified that drugs were readily available at The Wave, and that methamphetamine is the principal drug in Hawaii. He also testified that it is highly addictive and that it produces an "intense" high that can last up to 12 hours. He also testified that while it is possible to take methamphetamine orally, it is typically smoked or snorted. Oral consumption, however, is an inefficient way to obtain the effects of the drug. Of the 175 individuals he had

come in contact with who had used methamphetamine, he had never heard of it being consumed by putting it in food or drink, nor had he ever come across an incident where someone [*6] had put it in someone else's food or drink. The appellant also presented evidence of his good military character and his veracity.

Discussion. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).* In this case there are but two elements: that the appellant used methamphetamine, and that the use was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, P 37b(2). Both elements, however, contain a knowledge requirement. *United States v. Mance, 26 M.J. 244, 253-54 (C.M.A. 1988).*

> Knowledge of the presence of a controlled substance is a required component of use. Knowledge of the presence of a controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally [*7] sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, P 37c(10). The recent decision of our Superior Court, in *Campbell*, significantly modified the

conditions under which the Government may rely upon this permissive inference.

Although *Campbell* dealt with lysergic acid diethylamide and the reliability of the testing methodology employed in that case, we do not believe that *Campbell* can be limited to its facts. Prior to *Campbell* it was well established that the trier of fact could draw a permissive inference of wrongful drug use based on a positive urinalysis. *United States v. Pabon, 42 M.J. 404, 405-06 (1995). Campbell*, however, provides that the "prosecution cannot rely solely on the presence in the body of the drug or its constituent elements." *Campbell, 50 M.J. at 160.* It further provides that where the prosecution intends to rely upon this inference, the Government must "establish the reliability of the testing methodology and explain the significance of the results of the test of the accused's sample." *Id.* This is normally done through the testimony of an expert witness. When such [*8] a witness is called:

> The prosecution's expert testimony must show: (1) that the "metabolite" is "not naturally produced by the body" or any substance other than the drug in question . . . (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have "experienced the physical and psychological effects of the drug," . . . and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample.

Id. (citations and internal quotes omitted).

In the appellant's case, the Government adequately established that methamphetamine does not naturally occur in the human body, and that the test results were reliable. We find, however, that the testimony of Dr. Czarny did not establish that the cutoff level and the appellant's nanogram level were sufficient to discount unknowing use and to indicate that the appellant experienced the physical and psychological effects of the drug. Additionally, no other evidence presented was sufficient to permit the prosecution [*9] to rely upon the inference. *See Campbell, 52 M.J. at 388-389.* Since the prosecution is not entitled to rely upon the presumption of knowing use in this case, and since it did not present any other direct or circumstantial evidence of knowing use, we find that the evidence is legally insufficient to prove the first element of the offense. *See United States v. Barnes, 53 M.J. 624, 2000 CCA LEXIS 129 (N.M.Ct.Crim.App. 2000).*

Conclusion

The findings and sentence are set aside. The Charge and Specification are dismissed. All rights and privileges the appellant lost due to this conviction shall be restored to him. n1 This case is returned to the Judge Advocate General of the Navy for appropriate disposition.

n1 This action moots the remaining five assignments of error.

Senior Judge TROIDL and Judge NAUGLE concur.

APPENDIX E

COMMAND HISTORY FOR THE NAVY DRUG SCREENING LABORATORY SAN DIEGO, CA

The Navy Drug Screening Laboratory, San Diego CA (NDSL, SD) is one of three Navy drug screening laboratories and one of six Department of Defense (DoD) drug screening laboratories authorized to perform urine drug testing on active duty and reserve military members. The Laboratory was established in 1971. From a small operation, the Laboratory has grown to a 68 staff (4 military and 64 civilian) who work together as a highly efficient, precise, world class team processing over 800,000 samples annually using sophisticated testing equipment including Gas Chromatography/Mass Spectrometry (GC/MS) and procedures helping to ensure a safe and ready military.

During the late 1960's to the early 1970's illicit drug use was steadily increasing in the United States population. The United States Armed Forces were deployed in Southeast Asia a region where illicit drugs were readily available and inexpensive. The result was the widespread use of illicit drugs of abuse by military personnel during the Vietnam conflict. In 1970, to combat this epidemic, the United States Congress mandated that the United States Armed Forces develop and fund programs to identify, treat, and rehabilitate returning service members with illicit drug or alcohol addiction and abuse problems.

The three Services formed programs to address the rampant drug abuse problem that was compromising the combat effectiveness of the United States Armed Forces. The United States Navy responded in 1971 by standing up drug testing laboratories in various Naval Hospitals across the country to test for drugs of abuse. LT L. L. Pitts, MSC, USN, a clinical chemist became the first Division Officer of the newly formed NDSL, SD. The Laboratory was staffed with a small military contingent and was a division of the Department of Laboratory Medicine at the Naval Hospital, San Diego (NHSD).

In 1972, LT R. Porter, MSC, USN became the Division Officer and the staff was increased to 11 civilians and 24 military. The drug groups tested then were amphetamines, barbiturates, and morphine. This was the beginning of the testing protocol where all specimens are screened. Presumptive positive results are then confirmed with a different confirmation procedure. Amphetamines and barbiturates were screened with Thin Layer Chromatography (TLC) and morphine was screened with a Free Radical Assay technique. Gas Liquid Chromatography (GLC) was used to confirm the presence of amphetamines and barbiturates while spectrofluorometry was used to confirm presumptive positive morphine results. Morphine confirmations were soon converted to GLC and codeine was added to the confirmation protocol for morphine.

The drugs of abuse testing workload was divided among the Department of Defense (DoD) laboratories along geographic lines as illustrated in Figure 1. In the early stages of the program, NDSL, SD received specimens from Army, Air Force, Marine Corps, and Navy commands in southern California as well as Navy ships deployed in the Command

In Chief, Pacific (CINCPAC) Area of Responsibility (AOR) and military installations in Hawaii and the Philippines.

In 1973, the Laboratory was relocated from building 14 to building 10 on the Naval Hospital campus at Balboa. During this transition, specimens were diverted to the NDSL, Oakland for testing. LCDR J. Callies, MSC, USN arrived in July 1974 and assumed the position of Officer in Charge/Division Head for the Laboratory.

From July 1974 to March 1975, the DoD drug-testing program was suspended while awaiting the ruling by the Court of Military Appeals (CMA) on the admissibility of laboratory data in an Army case. As a result of this suspension of testing the civilian staff at the laboratories underwent a reduction in force (RIF). The drug-testing program was re-established in 1975 upon the ruling of admissibility of laboratory data as legal evidence of use of illegal drugs in violation of the Uniform Code of Military Justice.

Technological advances emerged during this time and Radioimmunoassay (RIA) had been introduced into the marketplace. DoD mandated the use of RIA for the screening of specimens for drugs of abuse in late 1975 due to the enhanced sensitivity and selectivity of the technique.

[figure omitted]

Figure 1. Historical Regional Distribution of DoD Drug Testing Laboratories Areas of Responsibility

The drug groups screened in 1977 were methaqualone (Quaalude, Sopor added 1976), opiates, barbiturates, and amphetamines. Cocaine screening began in January 1977 on

a trial basis and was halted in April 1977. By 1978, the drug panel was increased with the addition of phencyclidine (PCP).

The DoD conducted a Worldwide Survey of military personnel in 1980. The survey responses revealed that 47% of Navy and Marine Corps junior enlisted used marijuana during the previous 30 days and that 26% of these reported being under the influence of drugs while at work. Overall use of drugs of abuse in the Navy was estimated to be at 33%. By July 1980 methaqualone was dropped and cocaine was added to the test panel.

One of a series of events which highlighted the seriousness of the drug abuse problem was the crash of an EA-6B Prowler on the deck of the USS Nimitz in 1981. The post accident investigation revealed that six of the fourteen dead aircrew and sailors had traces of tetrahydrocannibinol (THC) in their blood, evidence of marijuana use. Congressional response was implementing a requirement for widespread detection of the use of drug of abuse and that action be taken against drug users. The Secretary of Defense (SECDEF) allowed disciplinary action to be taken from urinalysis results demonstrating the DoD response. Admiral Haywood, then Chief of Naval Operations (CNO), issued a "War on Drugs" directive, and a "Zero Tolerance" policy expressing the Navy's position on the drug abuse problem.

With this directive came a great increase in the number of samples submitted to the Navy drug testing labs resulting in a huge backlog. The drug panel had changed by the fall of 1981 to PCP, morphine, amphetamines, barbiturates, cocaine, and cannabinoid (THC). There were several major developments that effected the Navy Drug Testing

Program occurred in 1981. The first was the development of the ability to analyze for THC testing by screening with immunoassay followed by confirmation by liquid-liquid extraction and detection with gas chromatography (GC). The second was the ruling in favor of the urinalysis drug screening program setting the precedent that drug testing results constitute legal evidence. At the same time, the labs implemented forensic drug testing processes with the added requirements of laboratory security, chain-of-custody procedures, method validation, and documentation of training.

By the end of 1982 the staff of NDSL, SD consisted of 28 permanent civilians, 24 military on temporary addition duty (TAD) assignment, and 6 reservists. In June 1982, the morphine drug compound designation changed to Opiate (OPI). Technological advances resulted in the replacement of liquid-liquid extraction with solid phase extractions technology using the PREP I Autoextractors for THC and cocaine significantly reducing turn-around-time (TAT). A double antibody procedure for RIA screening protocols was also introduced resulting in improved sensitivity. By August 1982 there was a 30,000 specimen backlog and the TAT was three months. In response, the number of civilian billets was increased and instrumentation was purchased in the fall of 1982 leading to the reduction of the TAT to less than 5 days with no backlog by the end of the year. Another factor that helped reduce TAT was the change in workload distribution by geographic regional distribution by branch of service.

Four major changes were implemented in the DoD Drug Testing Laboratories in 1983. First, most billets were converted to civilian positions so a massive civilian recruitment effort was begun to bring civilian staffing to 68 billets. The Office of Civilian Personnel Management

(OCPM), Washington Office, conducted audits of all Navy drug labs with the objective of standardizing the civilian technical position descriptions (PDs) in all the labs. The second significant change was the introduction of a word processor system for Optical Character Reader (OCR) message generation greatly reducing manual typing of result messages. Third, to ensure the technical competency of the laboratory staff was maintained, a massive training program was implemented for new employees. Finally, technological innovations allowed the introduction of mass spectrometry to confirm all THC positives. TAT had been reduced to four days with a testing panel consisting of PCP, opiates, amphetamines, THC, barbiturates, and cocaine.

On 8 June 1984, the NDSL, SD was established as an Echelon 4 Command with a Commanding Officer (CO) under the Geographic Commander (GEOCOM) Southwest Region. CDR G. R. Koehn, MSC, USN became the first Commanding Officer of NDSL, SD.

On 28 August 1987, CDR D. F. Snook, MSC, USN relieved CDR Koehn.

On 20 June 1988, NDSL, SD relocated to building 26-2B (figure 2) from building 10. These new spaces were previously used as the NHSD Emergency Room, Pharmacy, and Morgue.

NDSL, SD received a DoD Inspector General's (IG) "Commendatory" report for the inspection held October 10-13, 1989. A report of this type was the first to be awarded to a DoD Drug Testing Laboratory and only one of two awarded by the IG Team in the prior 4 years. The commendation was for NDSL, SD developing and obtaining DoD level approval to implement, a new methamphetamine

(METH) specific antibody for use in conducting initial Radioimmunoassay (RIA)

[figure omitted]

Figure 2. NDSL in Bldg 26-2B

screening of specimens.

On 22 December 1989, the reporting chain of command was changed from GEOCOM, Southwest Region to the Navy Environmental Health Center (NEHC), Norfolk, VA. During the same year, Executive Order 12564 established the Drug-Free Federal Workplace Program. OPNAVINST 5355.4, mandated that all positions in NDSLs be Test Designated Positions (TSPs), meaning all civilians must be drug tested. A Drug Program Coordinator was established that would provide oversight to random testing of the civilian staff.

On 5 November 1990, the Command received the first National Institute on Drug Abuse (NIDA) Certificate of Appreciation presented to a DoD Drug Testing Laboratory. NIDA chose NDSL, SD to assist with their Laboratory Inspector Training Courses. The DoD Drug Testing Program and the Navy Drug Testing Program had been the model used for the development of the civilian inspection criteria during our 2 ½ years of assistance. NIDA based their Quality Standards on DoD and the Navy Drug Testing Program, using them while inspecting and certifying 57 civilian drug-testing laboratories.

On 31 May 1991, CAPT Snook was relieved by CAPT J. P. Christopher, MSC, USN. During that year, authorized civilian staffing was increased from 60 to 93 in November 1994 in anticipation of an increase in workload from the Base

Realignment and Closure (BRAC) of NDSL, Oakland. Five civilian staff members, frozen positive specimens, and legal documentation were transferred to NDSL, SD from the closed Oakland facility. Figure 3 shows the current distribution of Navy Drug Screening Laboratories areas of responsibility. Since the combined monthly total of specimens processed by NDSL's, San Diego and Oakland was approximately 58,000, the Laboratory was built up to handle an increased capacity of up to 70,000-80,000 specimens a month. NDSL, SD was certified by the Armed Forces Institute of Pathology (AFIP) to perform Lysergic Acid Diethylamide (LSD) confirmation in 1994 and this was added to the test panel performed by the laboratory.

[figure omitted]

Figure 3. Regional Distribution of Navy Drug Screening Laboratories Areas of Responsibility as of Aug 2003

On 27 October 1995, LCDR E. C. Vias, MSC, USN relieved CAPT Christopher. In September 1995, the Laboratory began phasing out the RIA screening procedures and began using an automated immunoassay procedure run on the Olympus AU800 Chemistry Analyzer. The AU800 Chemistry Analyzer did not require radioactive material as part of the screening process. The immunoassay kits used consisted of KIMS immunoassay kits for all drug classes except LSD and methamphetamine. Also in 1995, the laboratory spaces were renovated to construct research and methods development to develop and evaluate new testing protocols for the detection and confirmation of drugs of abuse and their metabolites. The research laboratory was fully operational by 1996 with the hiring of a Ph.D. level civilian research scientist and the assignment of two research technicians. In that same year, the DoD implemented a Forensic Toxicology Drug Testing

Laboratory (FTDTL) Laboratory Information Management System (LIMS) to enhance the forensic integrity of specimen tracking and reporting results.

On 27 September 1998, LCDR L. K. McWhorter, MSC, USN relieved CDR Vias.

CAPT M. E. Moynihan, MSC, USN relieved LCDR McWhorter on 29 September 1999 and LCDR McWhorter assumed the position of overall program manager for the Navy Drug Testing Program.

During 2000, there were many technological developments. The Laboratory participated in the development of a new extraction and derivatization procedure for 6-acetylmorphine (6-MAM), the heroin metabolite. The previous procedure produced artificially high results when large amounts of free morphine were present. The new procedure, which employs a trimethlysilyl derivative, eliminated this interference. The Laboratory also participated in the modification and validation of a more efficient GC/MS barbiturate confirmation procedure. The new procedure was faster and more sensitive because of a single step extraction combined with a more polar solvent that resulted in greater sensitivity for phenobarbital. Recovery studies showed that the recovery of phenobarbital was improved from approximately 15% to 80% after implementation of the new procedure. New immunoassays for THC and COC were also introduced in the Screening Department. These new assays exhibited greater specificity than the previous ones so fewer negative specimens were being sent for confirmatory analysis and the THC confirmation positive rate went from 80% to 95%.

In 2001, a new immunoassay analyzer, the Roche-Hitachi Modular, was installed to perform initial screening tests. The

modular design of the new analyzer allows for the processing of approximately 400 specimens per hour.

During 2002, new solid phase extraction technology was introduced which uses SPE cartridges with a positive pressure manifold (PPM). The introduction of this new technology significantly reduced confirmation analysis times and the amount of chemical waste generated by the Laboratory. Also that year, the billet structure of NDSL, SD was revised reducing civilian billets by six. The billets were transferred to the Homeland Defense Department as a result of the terrorist attacks of 11 September 2001.

On 27 March 2003, CDR M. L. Finch, MSC, USN relieved CAPT Moynihan in a change of command and retirement ceremony.

APPENDIX F

THE AMERICAN HERITAGE DICTIONARY (2D COLLEGE ED. 1982), AT 524.

fo•ren•sic (fə-rĕn′sĭk, -zĭk) *adj.* **1.** Pertaining to or employed in legal proceedings or argumentation; *forensic medicine.* **2.** Of, pertaining to, or employed in debate or argument; rhetorical. [**Lat.** *forensis* < *forum*, forum] **–fo•ren′si•cal•ly** *adv.*